

STATE OF MICHIGAN
COURT OF APPEALS

EL PASO PRODUCTION OIL & GAS
COMPANY,

Plaintiff-Appellee,

v

PRIVATE BUSINESS, INC.,

Defendant,

and

BRONCO OIL COMPANY, INC.,

Defendant-Appellant.

UNPUBLISHED

June 27, 2006

No. 268141

Ingham Circuit Court

LC No. 04-000671-CZ

Before: Davis, P.J., and Sawyer and Schuette, JJ.

PER CURIAM.

The circuit court granted plaintiff's motion for summary disposition. Defendant Bronco Oil Company appeals, and we affirm. This appeal is being decided without oral argument in accordance with MCR 7.214(E).

Plaintiff had a business relationship with Bronco Oilfield Services, a Texas corporation unrelated, despite the similarity in name, to defendant Bronco. In 2002, the Texas concern sent plaintiff two invoices, in response to which plaintiff mistakenly sent two checks, payable to defendant Bronco, to non-participating defendant Private Business, Inc.,¹ who negotiated them as a collection agent for Citizens Bank, who had purchased Bronco's accounts receivable pursuant to a business manager agreement. Citing a lack of any business relationship with defendants, plaintiff commenced action to recover the funds.

In answering the complaint, Bronco denied ever receiving the two checks. However, Citizens' custodian of business records testified by affidavit that the proceeds of two checks of

¹ This defendant was separately dismissed from the case, without prejudice, and so is not participating in this appeal.

which plaintiff makes issue were forwarded to Citizens, who credited amounts corresponding to those two checks to Bronco.

In contrast, Bronco, in opposing plaintiff's motion for summary disposition, presented affidavit testimony from its accounts receivable manager, which stated that the record upon which plaintiff's agent's relied "is not an account statement of Bronco. It is an annual account statement for Citizens Bank and Private Business, Inc., an agent of Citizens Bank (emphasis in original). Bronco's witness added that Bronco's checking account with Citizens, "the exclusive account" through which Citizens credited funds to Bronco, "indicates that Citizens Bank did not make deposits" in amounts corresponding to the checks at issue (emphasis in original). The witness further maintained that Citizens held the funds in question in a "suspense account," and the funds were never transferred from there to Bronco's checking account. The witness concluded, "Citizens did not credit or pay Bronco for the . . . checks" in question.

Plaintiff retorted that the checking account of which Bronco's agent spoke did not settle the question, because Citizens in fact "reduced Bronco's indebtedness on the business manager credit product" by amounts corresponding to the checks in question. Plaintiff presented with its reply brief in support of its motion for summary disposition a supplemental affidavit in which Citizens' custodian of business records testified that Citizens credited Bronco for the funds in question by reducing Bronco's loan account balance in kind. Plaintiff additionally points to Citizens' statement documenting activity on its loan to Bronco, which includes reductions in principal precisely corresponding to the dates and amounts of the checks in question.

In granting plaintiff's motion for summary disposition, the trial court stated as follows:

It is my opinion that the records in this case clearly disclose that the money was credited for the benefit of this Defendant to the accounts of Citizens Bank, and that it had paid down a balance on the loans that were previously outstanding. The fact that two other checks on that one day were done in the exact same day is compelling evidence of that. The fact that it wasn't put into a checking account is irrelevant to these proceedings.

This Court reviews a trial court's decision on a motion for summary disposition de novo as a question of law. *Ardt v Titan Ins Co*, 233 Mich App 685, 688; 593 NW2d 215 (1999). Plaintiff brought its motion for summary disposition under MCR 2.116(C)(9) (failure to state a valid defense), and MCR 2.116(C)(10) (lack of evidentiary support). However, a motion under MCR 2.116(C)(9) should be decided only on the pleadings. *Attorney General v City of Flint*, 269 Mich App 209, 211; ___ NW2d ___ (2005). The trial court relied on evidence not included in the pleadings, so we treat this as a grant of summary disposition in accordance with MCR 2.116(C)(10). See *id.*

"In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). Where the moving party has produced evidence in support of the motion, the opposing party bears the burden of producing evidence to establish that a genuine issue of disputed fact exists. *Skinner v Square D Co*, 445 Mich 153, 160; 516 NW2d 475 (1994), citing MCR 2.116(G)(4).

Bronco protests that the trial court erred by resolving a credibility contest created by the parties' respective affidavits. See *Manning v Hazel Park*, 202 Mich App 685, 689; 509 NW2d 874 (1993) (in deciding motions for summary disposition, "[t]he court may not make factual findings or weigh credibility . . ."). However, Bronco's accounts receivable manager attested to activity in only Bronco's checking account with Citizens. That agent did not address Bronco's loan history with Citizens, let alone the possibility that credits might be applied to the loan. On appeal, Bronco does not challenge the veracity of plaintiff's exhibits showing the existence of a loan, and the application of amounts corresponding to the checks in question to pay it down, or otherwise try to reconcile that evidence with its theory. Nor does Bronco present evidence to show that those two documented credits against its loan obligations stemmed from other than the checks that plaintiff mistakenly sent.

For these reasons, we agree with the trial court that the evidence can only be interpreted as showing that Bronco did indeed receive the benefit of the two checks that plaintiff erroneously sent.

Affirmed.

/s/ Alton T. Davis
/s/ David H. Sawyer
/s/ Bill Schuette